

1 Barbara J. Parker (SBN 69722)
City Attorney
2 Otis McGee, Jr. (SBN 71885)
Chief Assistant City Attorney
3 Colin Troy Bowen (SBN 152489)
Supervising Deputy City Attorney
4 OAKLAND CITY ATTORNEY
One Frank Ogawa Plaza, 6th Floor
5 Oakland, CA 94612
Tel: 510.238.3601 Fax: 510.238.6500
6

7 Kevin D. Siegel (SBN 194787)
E-mail: ksiegel@bwslaw.com
Gregory R. Aker (SBN 104171)
8 E-mail: gaker@bwslaw.com
Timothy A. Colvig (SBN 114723)
9 E-mail: tcolvig@bwslaw.com
Christopher M. Long (SBN 305674)
10 E-mail: clong@bwslaw.com
BURKE, WILLIAMS & SORENSEN, LLP
11 1901 Harrison Street, Suite 900
Oakland, CA 94612-3501
12 Tel: 510.273.8780 Fax: 510.839.9104

13 Attorneys for Defendant
CITY OF OAKLAND
14
15

16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA
18 SAN FRANCISCO DIVISION
19

20 OAKLAND BULK & OVERSIZED
21 TERMINAL, LLC,

Plaintiff,

22 v.

23 CITY OF OAKLAND,

24 Defendant.

25 SIERRA CLUB and SAN FRANCISCO
26 BAYKEEPER,

27 Defendant-Intervenors.
28

Case No. 3:16-cv-07014-VC

**DEFENDANT CITY OF OAKLAND'S
STATEMENT OF POSITION RE:
DEFENDANT-INTERVENORS'
RULE 52(C) MOTION FOR
JUDGMENT**

Trial Date: January 16, 2018
Ctrm.: No. 2, 17th Floor
Judge: Honorable Vince Chhabria

1 Defendant City of Oakland (“City”) presents the following position with respect to
 2 Defendant-Intervenors’ Motion for Judgment under Federal Rule of Civil Procedure 52(c)
 3 (“Motion”) and joins therein to the extent that Intervenors and the City concur that the City is
 4 entitled to judgment on OBOT’s breach of contract claim because the City was and is entitled to
 5 apply the Ordinance to OBOT without reliance on section 3.4.2 of the Development Agreement.

6 I. INTRODUCTION

7 Government Code section 65866 provides that “[a] development agreement shall not
 8 prevent a city ... in subsequent actions applicable to the property, from applying new rules,
 9 regulations, and policies **which do not conflict** with those rules, regulations, and policies
 10 applicable to the property as set forth herein.” [Emphasis added.] Ordinance No. 13385 does not
 11 conflict with any vested right obtained by Plaintiff Oakland Bulk & Oversized Terminal, LLC
 12 (“OBOT”), either pursuant to the 2013 Development Agreement (“DA”) or pre-existing City
 13 regulations. Thus, this Court should rule that DA section 3.4.2 does not apply. Therefore, the
 14 City Council’s first of two alternative grounds for applying the Ordinance to OBOT—that OBOT
 15 never had acquired a right to develop a bulk goods terminal *for the purpose of storing and*
 16 *handling coal*—prevails, and the City is entitled to judgment on OBOT’s breach of contract claim
 17 (and DA section 3.4.2 need not be applied).

18 However, if this Court determines that the Ordinance conflicts with OBOT’s right under
 19 pre-DA City regulations to develop a bulk goods terminal, then the City’s second of two
 20 alternative grounds for applying the Ordinance to OBOT—the City Council’s DA section 3.4.2
 21 determination, based on substantial evidence, “that a failure to do so would place existing or
 22 future occupants or users of the Project, adjacent neighbors, or any portion thereof, or all of them,
 23 in a condition substantially dangerous to their health or safety”—applies. Since the City
 24 Council’s section 3.4.2 determination was based on substantial evidence, the City prevails.

25 Under either scenario, the City has not contracted away its police power. In the City
 26 Council’s action to apply the Ordinance to OBOT (by adopting Resolution No. 86234), and in
 27 this litigation, the City has maintained that OBOT never had a right—by the DA or the then-
 28 existing City regulations and approvals upon which it had a right to rely pursuant to the DA—to

1 store and handle bulk goods. Moreover, the Court is obligated to narrowly read DA section 3.4.2
2 in a manner that preserves the City’s police power (and to avoid ruling that the City contracted
3 away its police power). Thus, the Court should reconcile California Government Code section
4 65866 and DA section 3.4.2 in the manner advanced herein.

5 Accordingly, the City joins Intervenors’ Motion to the extent Intervenors assert that
6 (1) there is no conflict between the Ordinance and pre-DA regulations, (2) DA section 3.4.2 can
7 be reconciled with California Government Code section 65866 and upheld as a valid exercise of
8 the City’s police powers with respect to post-DA regulations that conflict with pre-DA
9 regulations, and (3) the City is entitled to judgment on OBOT’s breach of contract claim.

10 II. FACTS

11 In 2013, the City and OBOT’s predecessor-in-interest entered into a Development
12 Agreement allowing OBOT to pursue development and use of a “ship-to-rail terminal designed
13 for the export of non-containerized bulk goods.” Trial Ex. 584 [DA] at 107. The DA gave
14 OBOT the right to pursue the development and use of private improvements described in the DA
15 (defined therein as the “Project”) pursuant to City regulations and approvals governing the
16 development and use of the Terminal that were in effect as of the date of the DA, July 16, 2013.
17 See Trial Ex. 584 [DA] at 20-23 (§§ 3.2, 3.4, and 3.4.1).

18 However, DA section 3.4.2 provides for an “exception to Developer’s vested rights under
19 this Agreement” that authorizes the City to “apply City Regulations adopted” after approval of
20 the DA if the “City determines based on substantial evidence and after a public hearing that a
21 failure to do so would place existing or future occupants or users of the Project, adjacent
22 neighbors, or any portion thereof, or all of them, in a condition substantially dangerous to their
23 health or safety....” Trial Ex. 584 [DA] at 0023.

24 On June 27 and July 19, 2016, the City introduced and adopted, respectively, Ordinance
25 No. 13385, amending the City’s Health and Safety Code to ban the storage or handling of coal
26 and coke (*e.g.*, petroleum coke) at bulk material facilities, as defined in the Ordinance. Trial
27 Ex. 4. The City also adopted Resolution No. 86234, determining that the Ordinance applied to
28 OBOT for two separate and independent reasons—the first of which does not rely on section

1 3.4.2, and the second of which does:

2 **Section 3.** The Coal-Coke Ordinance applies to the Project
 3 Facilities and Tenants and each of them, and/or any Owner or
 4 Operator of a Coal or Coke Bulk Material Facility (as defined in the
 5 Coal-Coke Ordinance), because Developer Entities have no right,
 6 under the DA or otherwise, not to be subject to the Coal-Coke
 7 Ordinance. *The application of the Coal-Coke Ordinance does not
 8 impair any vested right regarding development or use of the subject
 9 property and thus falls outside the limitations on subsequent
 10 regulations, including as set forth in Exhibit D-2-2 and Sections 3.2
 11 and 3.4.1 of the DA.*

12 **Section 4.** *Separately and independently, the Coal-Coke Ordinance
 13 applies to the Project Facilities and Tenants, and each of them,
 14 and/or any Owner or Operator of a Coal or Coke Bulk Material
 15 Facility (as defined in the Coal-Coke Ordinance), because the City
 16 Council hereby finds and determines, based on substantial evidence
 17 in the record, after conducting public hearings, that failure to apply
 18 the Coal-Coke Ordinance to the Project Facilities and Tenants, and
 19 each of them, and/or to any Owner or Operator of a Coal or Coke
 20 Bulk Material Facility (as defined in the Coal-Coke Ordinance),
 21 would place existing and/or future occupants or users of the
 22 Project, adjacent neighbors, or any portion thereof, or all of them,
 23 in a condition substantially dangerous to their health and/or safety
 24 (as stated in the DA) if the Project Site is developed with a Coal or
 25 Coke Bulk Material Facility.*

26 Trial Ex. 598 [Resolution] at 0007 (italics added).

27 III. ANALYSIS

28 OBOT does not have a vested right to develop a coal-handling terminal. Rather, the DA provided OBOT a vested right to rely on pre-DA City regulations and approvals in pursuit of its development and use of a bulk goods terminal. Dkt. 71 at 1 [Order Granting Motion to Intervene and Denying Motions to Dismiss] (OBOT “never acquired a vested right to develop a coal-handling terminal,” rather the DA “purported to enshrine the regulatory regime to which the developer’s plans would be subject”).

The Court has questioned whether the City unlawfully contracted away its police powers, in violation of California Government Code section 65866, to the extent that it agreed in DA section 3.4.2 that it could only apply post-DA regulations to create an exception to OBOT’s vested rights if the City complied with the process and standards set forth in section 3.4.2

As explained below, the City did not contract away its police powers, and it properly determined that (1) it was authorized to apply the Ordinance to OBOT without relying on DA

1 section 3.4.2, but, if section 3.4.2 applied, (2) the City lawfully created an exception to OBOT's
2 vested right to rely on pre-DA regulations pursuant to section 3.4.2.

3 Government Code section 65866 provides as follows:

4 **Unless otherwise provided by the development agreement,**
5 **rules, regulations, and official policies governing permitted uses**
6 **of the land, governing density, and governing design,**
7 **improvement, and construction standards and specifications,**
8 **applicable to development of the property** subject to a
9 **development agreement, shall be those rules, regulations, and**
10 **official policies in force at the time of execution of the**
11 **agreement. A development agreement shall not prevent a city,**
12 **county, or city and county, in subsequent actions applicable to the**
13 **property, from applying new rules, regulations, and policies**
14 **which do not conflict with those rules, regulations, and policies**
15 **applicable to the property as set forth herein,** nor shall a
16 development agreement prevent a city, county, or city and county
17 from denying or conditionally approving any subsequent
18 development project application on the basis of such existing or
19 new rules, regulations, and policies.

20 Cal. Gov't Code § 65866 (emphasis added).

21 Here, OBOT had a right to pursue the development and use of a bulk goods terminal
22 pursuant to the DA and pre-existing City regulations and project approvals. *See* Trial Ex. 584 at
23 20-23 (§§ 3.2, 3.4, 3.4.1). As stated in Section 3 of the Resolution (Trial Ex. 598 at 0007), OBOT
24 never acquired a right to store or handle coal or coke, either in the DA or otherwise, *e.g.*, pursuant
25 to any pre-DA regulations or approvals.

26 The Ordinance prohibits OBOT from storing and handling coal and coke, but since this
27 post-DA regulation does not conflict with any pre-DA regulation, under Government Code
28 section 65866, the “development agreement shall not prevent” the City from applying the
Ordinance to OBOT. *See* Cal. Gov't Code § 65866 (“A development agreement shall not prevent
a city ..., in subsequent actions applicable to the property, from applying new rules, regulations,
and policies which do not conflict with those rules, regulations, and policies applicable to the
property as set forth herein”).

Yet the Court inquires whether, in approving DA section 3.4.2, the City unlawfully
attempted to contract away its authority to apply a new law that does not conflict with pre-DA
regulations. The answer is no.

1 First, the DA only vested in OBOT the right to rely on pre-DA regulations and approvals
 2 governing the development and use of the Project, as opposed to granting OBOT vested rights to
 3 rely on other regulations and approvals, *e.g.*, employment or tax legislation. *See* Trial Ex. 584 at
 4 20-23 (§§ 3.2, 3.4, and 3.4.1). Thus, DA section 3.4.2 is limited to post-DA regulations that
 5 govern the development and use of the Project.¹

6 Second, to the extent possible, courts construing a contract must adopt an interpretation
 7 that “renders a contract valid and effectual.” *Titan Group, Inc. v. Sonoma Valley County*
 8 *Sanitation Dist.*, 164 Cal.App.3d 1122, 1127 (1985) (quoting *Serv. Emps. Int’l Union, Local 18 v.*
 9 *Am. Bldg. Maint. Co.*, 29 Cal.App.3d 356, 359 (1972)). This Court should thus construe section
 10 3.4.2 to apply only to regulations that “conflict” with the regulations in effect at the time the
 11 agreement was entered. Such an interpretation is consistent with Government Code section
 12 65866 and reconciles it with DA section 3.4.2. *See Cotta v. City and Cnty. of San Francisco*, 157
 13 Cal.App.4th 1550, 1559 (2007) (in interpreting contracts that bind government entities, courts
 14 should avoid construing the contracts to impermissibly impair the right to exercise the police
 15 power); *accord City of Burbank v. Burbank-Glendale-Pasadena Airport Auth.*, 72 Cal.App.4th
 16 366, 376-77 (1999). Since the Ordinance does not conflict with any pre-DA regulations, the City
 17 was authorized to apply the Ordinance to OBOT without relying on section 3.4.2.²

18 Indeed, Resolution No. 86234 is consistent with the foregoing. The City Council
 19 determined that the Ordinance did not conflict with any vested right OBOT had acquired, and
 20

21 ¹ The forgoing is consistent with the Development Agreement Statute (Cal. Gov’t Code
 22 §§ 65864 – 65869.5), which “allows a city or county to freeze zoning and other land use
 23 regulation applicable to specified property.” *Santa Margarita Area Residents Together v. San*
 24 *Luis Obispo Cty.*, 84 Cal.App.4th 221, 226-27 (2000). With respect to such regulations,
 25 development agreements are limited, statutory exceptions to the California Supreme Court rule
 26 that a developer secures a vested right to preclude imposition of new land use regulations only
 27 after (1) the governmental entity issues a building permit, and (2) the developer substantially
 28 relies on the permit by expending construction costs. *See id.* at 229-230, and *Avco Community*
Developers, Inc. v. South Coast Regional Com., 17 Cal.3d 785, 796 (1976).

² By contrast, had the City adopted a new ordinance that would, if applied to OBOT,
 impose conflicting regulations governing development and use of the site—*e.g.*, regarding the
 density of the site, set back requirements, height limits—then the City’s only option for applying
 the ordinance to OBOT would be pursuant to section 3.4.2.

1 thus that application of the Ordinance did not impair any right. As such, the first, independent,
2 and sufficient ground for the Resolution was that the Ordinance applied to OBOT, and that
3 section 3.4.2 need not be invoked.

4 However, if the Court finds that the Ordinance does conflict with pre-DA regulations or
5 that OBOT otherwise had a vested right not to be subject to the Ordinance, then the Court should
6 affirm the City's exercise of its rights under section 3.4.2 to apply the Ordinance to OBOT,
7 because City Council properly determined, as a second, separate and independent ground for
8 applying the Ordinance, based on substantial evidence in the record:

9 that failure to apply the Coal-Coke Ordinance to the Project
10 Facilities and Tenants, and each of them, and/or to any Owner or
11 Operator of a Coal or Coke Bulk Material Facility (as defined in the
12 Coal-Coke Ordinance), would place existing and/or future
13 occupants or users of the Project, adjacent neighbors, or any portion
14 thereof, or all of them, in a condition substantially dangerous to
15 their health and/or safety (as stated in the DA) if the Project Site is
16 developed with a Coal or Coke Bulk Material Facility.

17 Trial Ex. 598 [Resolution] at 0007 (*italics added*).

18 In sum, the Court should (1) interpret DA section 3.4.2 in a manner that reconciles it with
19 California Government Code section 65866 and (2) uphold the City Council's determination that
20 application of the Ordinance neither conflicts with any pre-DA regulations nor impairs any vested
21 right. Accordingly, the City joins Intervenors' Motion to the extent it is consistent with the City's
22 position.

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

///

///

///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IV. CONCLUSION

For the foregoing reasons, this Court should grant judgment to the City pursuant to Rule 52(c). Alternatively, this Court should deny OBOT’s breach of contract claim because the City Council’s second ground for applying the Ordinance, based on section 3.4.2, satisfied the standards thereunder.

Dated: February 9, 2018

BURKE, WILLIAMS & SORENSEN, LLP

By: /s/ Kevin D. Siegel
Kevin D. Siegel
Gregory R. Aker
Timothy A. Colvig
Christopher M. Long
Attorneys for Defendant
CITY OF OAKLAND